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NO. 83-1361

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

* * *

UNITED HOME RENTALS,
MICHAEL LIVINGSTON,
W. EUGENE BUSHMAN,

Petitioners,

V.

THE STATE OF TEXAS,
THE TEXAS REAL ESTATE COMMISSION,

Respondents.

* * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

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QUESTIONS PRESENTED

1. Whether this action by United Home Rentals is barred by the doctrine of sovereign immunity in the Eleventh Amendment to the United States Constitution.

2. Whether this action by United Home Rentals should be dismissed by the federal courts due to the doctrine of *Pullman* abstention.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COME the State of Texas and the Texas Real Estate Commission, and file their Opposition to Petition for Writ of Certiorari in response to the Petition for Writ of Certiorari filed by Petitioner United Home Rentals.

OPINION BELOW

The district court opinion is found at 548 F.Supp. 566 (N.D. Tex. 1982). The opinion of the Court of Appeals reversing the decision of the district court is reported at 716 F.2d 324 (5th Cir. 1983).

STATEMENT OF THE CASE

After a district court decision that the Texas Real Estate License Act did not violate the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution as applied to the business operations of United Home Rentals (hereinafter referred to as UHR), Petitioners filed a second action seeking to enjoin the Texas Real Estate Commission from enforcing the Act against UHR as violative of its First Amendment right to free commercial speech. The Commission asserted that UHR's activities made it a "broker" as defined in the Texas Real Estate License Act, so that UHR employees could not lawfully engage in those activities without a real estate license. TEX.REV.CIV.STAT. ANN. art. 6573a, §2(2). The licensure requirement enforced by the Commission seeks to regulate the acts of UHR, not its speech. These acts did include a speech element, but essentially the UHR employees performed acts in soliciting, verifying, and selling lists of rental vacancies which aid in bringing together potential tenants and landlords "for the purpose of effecting the ..., lease, or rental of real estate." TEX.REV.CIV.STAT.ANN. art. 6573a, §§ 2(2)(I), 2(2)(J).

Based on its understanding of the licensure requirements and its knowledge of UHR's business activities, the Commission determined that UHR employees should be licensed. It disapproved the licenses because applicants signed under oath a statement that they had not been performing regulated acts without a license, when in fact they had been. (Opinion below, 548 F.Supp. 566, 568-569 (N.D.Tex. 1982)). The applicants' careless disregard for the oath to which they swore caused the Commission concern about their honesty and trustworthiness. TEX.REV.CIV.STAT. ANN. art. 6573a, §6(b). It must be kept in mind that these individuals were engaging in a business known for its history of misrepresenting and deceiving the Texas consumer. (Opinion below, 548 F.Supp. 566, 569 (N.D. Tex. 1982)).

On September 29, 1982 the district court found that the Real Estate License Act as applied to UHR violated the First Amendment right to free commercial speech, even though the intent of the statute is to regulate conduct, not speech. On October 3, 1983 the Fifth Circuit Court of Appeals reversed the decision and ordered the cause dismissed without prejudice based on the principle of abstention.

SUMMARY OF THE ARGUMENT

The Court of Appeals properly held that the principles of abstention as described in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), require a federal court to dismiss this cause. The doctrine of sovereign immunity of the Eleventh Amendment of the United States Constitution also bars this action.

ARGUMENT

I.
THIS ACTION BY UNITED HOME RENTALS IS ABSOLUTELY BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY FOUND IN THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

After the case of *Chisholm v. Georgia*, 2 Dall. 419 (1793), the Eleventh Amendment was added to the United States Constitution to prohibit suits in federal court against a state by citizens of another state. U. S. CONST. amend. XI. This amendment was interpreted in *Hans v. Louisiana*, 134 U.S. 1 (1890), to bar federal court suits against a state by one of its own citizens. (See also *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 280 (1973))

This limitation on federal jurisdiction can be raised at any point in the proceeding "... even though urged for the first time in this Court." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945). This is because "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: ..." *Ex parte State of New York, No. 1*, 256 U.S. 490, 497 (1921).

In the absence of state consent, the Eleventh Amendment bars a suit in federal court against a state or one of its agencies. *Florida Dept. of Health v. Florida Nursing Home Assn.*, 450 U.S. 147 (1981) (*per curiam*). Even a suit against state officials is barred when "... the state is the real, substantial party in interest," *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945), or "... if the decree would operate against the latter (state)," *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (*per curiam*), or would "... restrain the Government from acting, or ... compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963), quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

An exception was created in *Ex Parte Young*, 209 U.S. 123 (1908), allowing suit in federal court against a state official for unconstitutional action. In such a case Plaintiffs may obtain prospective injunctive relief, but not retroactive monetary relief. *Edelman v. Jordan*, 415 U.S. 651 (1974). Even an injunction may be subject to the Eleventh Amendment bar. *Cory v. White*, 457 U.S. 85, 91 (1982). Where relief is sought effectively against a state, the Eleventh Amendment bars an injunction against errors of law by state officials acting in their official capacities. *Pennhurst State School and Hospital v. Halderman*, 52 U.S.L.W. 4155, 4161 (U.S. January 23, 1984), citing *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949).

The present action is clearly a suit against the state. The only defendants are the State of Texas and an agency of the State of Texas, the Texas Real Estate Commission. UHR did not name any public officials as defendants. Thus, the *Ex Parte Young* fiction cannot apply.

The State of Texas has not consented to this lawsuit in any fashion. It is not only the "real, substantial party in interest," it is the only party defendant to this action. Any decision favorable to UHR would operate against the State, restraining it from enforcing the Texas Real Estate License Act.

The §1983 flavor of this suit does not overcome the Eleventh Amendment bar. A suit under 42 U.S.C. §1983 cannot avoid the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332, 342

(1979). A federal court is barred by the Eleventh Amendment "from granting any relief" in such a suit "brought directly against a State, ...". *Pennhurst*, 52 U.S.L.W. at 4163 and n. 30; see also *Alabama v. Pugh*, 438 U.S. 781 (1978) (*per curiam*). Whether these Plaintiffs "foolishly attempt(ed) to sue the State in its own name, ...", *Pennhurst*, at 4162, this suit must be barred by the doctrine of sovereign immunity in the Eleventh Amendment. As noted in the *Pennhurst* case concerning sovereign immunity of the state, the abstention doctrine causes unclear issues of state law to be "split off and referred to the state courts." *Id.*, at 4164.

II.

THE PULLMAN DOCTRINE OF ABSTENTION REQUIRES THIS CAUSE OF UNITED HOME RENTALS TO BE DISMISSED BY THE FEDERAL COURTS.

In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the Court determined that the federal courts should abstain from deciding cases requiring them to interpret unclear state laws not yet construed by the state courts. Federal court decisions in such cases are nothing more than "a forecast rather than a determination" of state law, and "a tentative answer which may be displaced tomorrow by a state adjudication". *Id.*, at 499-500. The Court found that such "an unnecessary ruling of a federal court" created "needless friction with state policies, ...". *Id.*, at 500. The Court has decided that the *Pullman* principle of abstention should be applied "(w)here resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, ... to avoid unnecessary friction in federal—state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harman v. Forssenius*, 380 U.S. 528, 534 (1965); *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 511 (1972).

The abstention doctrine is "not an automatic rule," but "a discretionary exercise of a court's equity powers" to be applied only in "'special circumstances', ... on a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). It is not an "ab-

dication of federal jurisdiction, but only the postponement of its exercise;..." *Harrison v. NAACP*, 360 U.S. 167, 177 (1959). It is "the exception, not the rule." *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 813 (1976).

Abstention is appropriate "(w)here strands of local law are woven into the case" and the federal right is "entangled in skein of state law", *McNeese v. Board of Education*, 373 U.S. 668, 673—74 (1963), or where the "nub of the whole controversy" involves "state law problems" that are "delicate ones," *Reetz v. Bozanich*, 397 U.S. 82, 85, 87 (1970), citing *City of Meridian v. Southern Bell T. & T. Co.*, 358 U.S. 639, 640-641 (1959) (*per curiam*), or where the case involves a "knotty state law question," *Wisconsin v. Constantineau*, 400 U.S. 433, 438 (1971). The Court has required abstention in those cases where the questions of law are "intensely local and immensely important to a wide spectrum of state government activities." *Elkins v. Moreno*, 435 U.S. 647, 662-663 n. 16 (1978). Where state laws are "fairly open to interpretation" the federal court should stay its hand until the state has an opportunity to consider the questions in order to serve the principle of comity in federal-state relations. *Harrison*, 360 U.S. at 176-77; see also *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100, 115-116 (1981). Where the federal and state court issues are not the same, abstention is proper, particularly where there is a state remedy available. *Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (*per curiam*). [1]

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1. While the Court of Appeals only applied *Pullman* abstention to this case, other types of abstention may also be appropriate. Abstention principles of *Younger v. Harris*, 401 U.S. 37 (1971), as expanded in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and *Juidice v. Vail*, 430 U.S. 327 (1977), urge abstention in this case due to the pending state proceedings. While *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n. 11 (1977), found that the state had submitted to the federal forum waiving the comity principle of abstention, the Court noted that the "wishes of the parties concerning adjudication" did not require court deference in *Pullman* abstention. While the abstention of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), may have involved more complex local issues than present here, the principle applied is the same. Likewise, the "exceptional circumstances" described in *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 818 (1976), and *Moses H. Cone Mem. Hospital v. Mercury Construction Corp.*, 51 U.S.L.W. 4156 (U.S. February 23, 1983), and the "advantages" of abstention in *Board of Regents v. Tomanio*, 446 U.S. 478, 496 (1980) (Brennan, J., dissenting), to be realized from state adjudication first in sparing "the federal courts some unnecessary work" apply here.

The Court has abstained under *Pullman* where it found the state law to be unclear or difficult. *Harrison*, 360 U.S. at 176-177; *Reetz*, 397 U.S. at 85; *Lake Carriers'* 406 U.S. at 511; *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 85 (1975). The Court has declined to abstain where the state law was clear as in *Harman*, 380 U.S. at 535, and *Examining Board v. Flores de Otero*, 426 U.S. 572, 597 (1976), or where the statute is unduly vague, *Baggett*, 377 U.S. at 378, or where the statute is overbroad and has been attacked as unconstitutional on its face, *Zwickler v. Koota*, 389 U.S. 241, 252 (1967); *Constantineau*, 400 U.S. at 439.

In cases where the state law determination could avoid the federal constitutional question, the Court has abstained. *Reetz*, 397 U.S. at 86-87; *Askew v. Hargrave*, 401 U.S. at 478; *Lake Carriers*, 406 U.S. at 512; *Harris County*, 420 U.S. at 85; *Bellotti v. Baird*, 428 U.S. 132, 148 (1976). In *Harman*, 380 U.S. at 536, *Zwickler*, 389 U.S. at 249-50, and *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973), the Court found that the federal constitutional issue could not be avoided. The Court also declined to abstain in cases in which the state's highest court had already considered the matter. *Kusper*, 414 at 55; *Orr v. Orr*, 440 U.S. 268, 276-77 (1979).

The Court has also declined to abstain where a fundamental civil right is invovled. *McNeese*, 373 U.S. at 674 (Education); *Harman*, 380 U.S. at 537 and *Kusper*, 414 U.S. at 56-57 (voting); *Zwickler*, 389 U.S. at 252 (free expression). The Court is concerned with the delay caused by abstention and the resulting piecemeal adjudication. *England v. Medical Examiners*, 375 U.S. 411, 418 (1964); *Harman*, 380 U.S. at 537; *Baggett*, 377 U.S. at 378-79.

There are important similarities between *Pullman* and this case. Both cases involve disputes concerning administrative orders or decisions. Both involve state laws which are unclear. As in *Pullman*, the Texas Supreme Court has not adjudicated the question concerning the reach of a state statute.

Special circumstances call for abstention in this case. First, were this statute to be construed by Texas courts, it could be interpreted in a manner that would avoid the constitutional

issue. The issue is the validity of a state agency interpretation of state law. The entire controversy results from a dispute as to whether the activities of UHR employees require a real estate license. Texas courts could decide that the Texas Real Estate Commission's interpretation is erroneous, or that the statute does not reach as far as the Commission asserts, thereby avoiding the constitutional question. See *Harrison*, 360 U.S. at 177-178; *Babbitt v. Farm Workers*, 442 U.S. 289, 307-312 (1979). Moreover, Plaintiff argues that the state law is "unconstitutional as applied" to the business of UHR, an argument properly suited for the application of abstention. *Harris County*, 420 U.S. at 86 n. 9; *Baggett*, 377 U.S. at 376-77.

Second, a decision now will have an important impact on the state. While the Court of Appeals may not have described the important state interest to the satisfaction of UHR, that interest exists. The Real Estate License Act was designed to protect the unsuspecting Texas public from the unscrupulous in the real estate business. *Henry S. Miller Co. v. Treo Enterprises*, 585 S.W.2d 674, 675-76 (Tex. 1979). If the federal court decision erroneously construes this state law and finds it unconstitutional as applied to businesses such as UHR, the state will be stripped of legislation protecting Texas consumers from the unscrupulous. See Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1078 (1974); *Younger v. Harris*, 401 U.S. at 51. The whole question revolves around "knotty" state law problems, fairly open to interpretation, the "nub" of which involve "intensely local and immensely important" matters of concern. Unlike *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 481 (1977), the benefits of abstention here are not "too speculative," and may "avoid the possibility of unnecessarily deciding a constitutional question." *Harris County*, 420 U.S. at 83. Also, the federal issue here is not necessarily the same issue which the state courts would consider. First Amendment protection of free commercial speech is at issue here. Before the state courts, the primary issue would be the the reach of the state law; i.e., does it even apply to these employees.

Since the federal issue is dependent upon the unclear and unresolved state law, abstention should apply to avoid needless

friction in federal—state relations and interference with the important state function of protecting the Texas public from dishonesty and fraud. Any federal decision now would be a premature and tentative constitutional adjudication, truly a forecast of local law "not binding on state courts and (which) may be discredited at any time ..." *Moore v. Sims*, 442 U.S. 415, 428 (1979).

Further, the Supreme Court itself has described the *Pullman* abstention doctrine without mentioning the importance of the state's interest. (See *Id.*, at 427-28; and *Harris County*, 420 U.S. at 83-84). As the Court said in *Moore v. Sims*, 442 U.S. at 429-430:

> (s)tate courts are the principal expositors of state law. Almost every constitutional challenge ... offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. ... The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims—a postulate we have repeatedly and emphatically rejected. (Citations omitted)

(For a discussion of access to federal courts for adjudication of constitutionality of state laws in state tax context, please see *McNary*, 454 U.S. 100, holding comity outweighs §1983 considerations and requires abstention)

Third, unlike *McNeese*, *Harman*, and *Kusper*, a fundamental civil right does not exist here. The First Amendment assertion relates to a peripheral constitutional right deserving only of limited constitutional protection. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978). Where the state law is unclear, balancing its consumer protection aspect against a peripheral commercial right should weigh in favor of protecting the public at least until the state courts have considered the matter; and particularly where, as here, no constitutional

infringement exists in the interim. (Opinion below, 716 F.2d at 333-334, n. 28).

Fourth, the delay caused by the piecemeal adjudication of cases required by abstention is not a factor here. [2] Since the Commission issued licenses to the subject employees of UHR based on the injunction granted by the district court, the delay occasioned by abstention should not create any undue hardship affecting its business operation. Since UHR admits that no licensees other than Livingston are now employed by it, (UHR Brief, p. 2), what UHR wants is a favorable decision on the merits which can be applied to the "new unlicensed" employees. These new employees are not part of this case. The applicability of this state law to these "new unlicensed" employees should be reserved for another day.

The State of Texas and the Texas Real Estate Commission do not object to the application of the *Pullman* abstention doctrine in this case. Admittedly, Texas and the Commission entered into stipulations in the district court waiving the abstention application. It seems clear, however, that the principles of *Pullman* abstention cannot be waived and may be considered by the Court *sua sponte*. *Bellotti v. Baird*, 428 U.S. at 143-144, n. 10. Indeed, *Pullman* abstention "surely does not require that this Court defer to the wishes of the parties concerning adjudication." *Hodory*, 431 U.S. at 480 n. 11. Although the Court in one case declined an invitation to consider abstention when first raised at oral argument, it hinted that if abstention had been raised in the court of appeals, abstention would be considered in the Supreme Court. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n. 11 (1980). Even the *Pullman*

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2. Actually greater delay would be occasioned if the position of UHR is upheld. Since the licenses in question were issued, no constitutional deprivation occurs if this action ends now as ordered by the Court of Appeals. If the Court of Appeals decision is reversed, however, the case supposedly will be remanded to that court for a decision on the merits, with or without further argument, and subsequent appeal possibly again to this Court on the merits. One of the major arguments against abstention—undue delay—should not be used to defeat its application and cause the very delay the denial of abstention is designed to avoid. Such an occurrence would be incongruent and nothing more than an academic exercise in light of the issuance of the licenses.

case itself involved the application of abstention principles by the Supreme Court.

This Texas law protects the Texas citizen by authorizing the State to close down the unscrupulous operators who are not licensed, and by cancelling the licenses of the unscrupulous who are licensed by the state. If a State waiver bars the application of abstention and the federal courts unnecessarily and erroneously construe this state law, the Texas public will be denied its protection. Under Texas law, the Attorney General cannot prejudice the rights of the State by any waiver. TEX.REV.CIV.STAT.ANN. art. 4411. (See Appendix) The application of abstention should be considered on its merits, and not avoided due to procedural technicalities occurring earlier in this lawsuit. The people of Texas certainly deserve more.

UHR argues that there is conflict between the Fifth Circuit and other courts of appeals concerning the application of the *Pullman* abstention principle and the question of *de novo* review at the appellate level. Yet, the Fifth Circuit clearly found an undecided and ambiguous issue of state law in this case that could be resolved without reaching the federal constitutional issue. (Opinion below, 716 F.2d at 332, 333). It also considered the delay inherent in abstention in reaching its decision. (Opinion below, 716 F.2d at 334). In applying these principals, it followed the *Pullman* abstention principles as outlined by the Supreme Court in case after case since *Pullman* itself. The Fifth Circuit applies the *Pullman* abstention principles enunciated by the Supreme Court, as all the courts apply them. There is no conflict between the *Pullman* doctrine as applied by the Fifth Circuit and that applied by other courts of appeals. Even the court of appeals in *D'Iorio v. County of Delaware*, 592 F.2d 681, 686 (3rd Cir. 1978), agrees that *Pullman* abstention can be raised *de novo* in the court of appeals.

Finally, contrary to UHR's assertion, this case does not involve the "wolf" of exhaustion of remedies in the "sheep's clothing" of abstention. The application of abstention principles

to a cause based on 42 U.S.C. §1983 is not novel. [3] UHR would deny power to the federal courts ever to abstain when the red flag of §1983 is unfurled. Over forty years of abstention decisions by this Court should not be so easily dismissed. Even *Patsy v. Florida Board of Regents*, 457 U.S. 496, 518-519 (1982), (White, J., concurring in part), notes the distinction between abstention and exhaustion. Exhaustion and abstention are distinct doctrines, neither masquerading as the other, yet both protecting important interests in judicial economy and federal—state relations. This case invokes abstention to protect these interests. Quite simply, exhaustion and abstention should no more be blended together than two wines of distinct bouquets be mingled in the same cask.

CONCLUSION

The decision of the Court of Appeals to reverse the district court and order dismissal of this cause without prejudice should be upheld. The doctrine of *Pullman* abstention requires that Texas courts first be given the opportunity to consider the difficult questions of state law before the federal courts determine if a federal constitutional issue remains to be reviewed. More importantly, since the state has not consented to suit, this action against Texas should be barred by the doctrine of sovereign immunity codified in the Eleventh Amendment of the United States Constitution.

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3. In the following §1983 cases abstention of some variety was deemed proper: *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Harrison*, 360 U.S. at 169; *Bellotti*, 428 U.S. at 136; *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434, 444-445, n. 8 (1977); and *McNary*, 454 U.S. 100 (1983). In *Middlesex County Ethics Committee v. Garden State Bar Assoc.*, 457 U.S. 423 (1982), a case quite similar to this one, the Court abstained under *Younger* abstention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies each of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the 9TH day of MARCH, 1984 to Mr. Steve Brutsché, JONES & BRUTSCHÉ, 3000 Turtle Creek Plaza, Suite 116, Dallas, Texas 75219, Mr. John E. Kennedy, 3315 Daniel, Dallas, Texas 75275, and Mr. H. Bartow Farr III, ONEK, KLEIN & FARR, 2550 M. St. N.W., Washington, D.C. 20037.

George Warner

GEORGE WARNER
Assistant Attorney General

APPENDIX

APPENDIX

ARTICLE 4411

No admission, agreement or waiver, made by the Attorney General, in any action or suit in which the State is a party, shall prejudice the rights of the State.

Acts 1846, p. 206; P.D. 211; G.L. vol. 2, p. 1148.